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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 614

MEURER STEEL BARREL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION AND SUPPORTING BRIEF

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner above named, respectfully shows:

This is a petition for a Writ of Certiorari to review a judgment made July 21, 1944 by the United States Circuit Court of Appeals for the Third Circuit, affirming a decision of The Tax Court of the United States, entered May 12, 1943.

I. Summary Statement of the Matter Involved.

Deficiencies in income and excess profit taxes for the year 1937 are involved. The commissioner determined a deficiency in income tax of $80,217.45 and in excess profits tax of $21,192.86 against the petitioner (R. 238a). These were, upon petition to The Tax Court of the United States, redetermined respectively at $19,415.86 and $6,157.33 (R. 263a) with memorandum findings of fact and opinion made by a division of that court (R. 238-262a). The decision of The Tax Court was affirmed with opinion (R. 265-271) by the United States Circuit Court of Appeals for the Third Circuit.

Petitioner was a corporation whose assets consisted of a barrel business, securities and a claim in suit. Its stockholders in January, 1937 granted a unilateral option to Jones, one of their number, to purchase their shares for a given price within a stated time (R. 2[illegible]9a). In the event of the optionee's exercise of the option, the optioners had the exclusive right to substitute for petitioner's shares, the shares of another corporation they were free to organize to acquire the business assets of the petitioner (R. 150a, ¶2d). The option proper was extended several times and before its expiration, Jones' attorney met with the stockholders' attorney Stern, in New York, to commence negotiating the terms of a contract of sale of business assets, instead of shares of stock (R. 242a, 127a, 128a, 142a). On the same day, July 9, 1937, the petitioner's shareholders met in the Long Island home of its president, Margaret C. Meurer (R. 266; 241a) and received and approved the report of its president that she believed it to be desirable to retire from the barrel business and that the company's attorney was about ready to submit a plan;

he was authorized to submit the plan to an adjourned session fixed for July 15, 1937 (R. 241a; 165a). On the latter day, a formal plan for the complete liquidation and dissolution of the petitioner was submitted and approved (R. 167a) and implementing resolutions were adopted (R. 168a-174a) for conveyance and transfer of the barrel business, good will and name to stockholders at noon of July 17th, as the first of a series of liquidating distributions contemplated by the plan (R. 242a-244a).

Five of petitioner's stockholders formed a partnership firm to engage in the barrel business and acquired from the remaining shareholders (in some instances by gift, in others by purchase) all the remaining outstanding shares of stock of petitioner or rights of such remaining stock in the declared first liquidating dividend (R. 244a-245a; 176a, 182a-186a). The petitioner on July 17, 1937, transferred and conveyed its barrel business to the partnership (R. 192a, 195a, 245a) and the transferee thereupon, as required in the corporate resolutions respecting the same (R. 242a), assumed (R. 197a) stated obligations with relation thereto, so as to leave the net value of the first distribution at the determined amount, $500,000 (R. 245a). The petitioner ceased business July 17, 1937 (R. 174a; 105a). The partnership entered into the barrel business July 17, 1937 and conducted and operated the same for its own account until July 30, 1937 (R. 246a).

Meanwhile the negotiations initiated on July 9, 1937 had continued to July 22, 1937 and culminated in a formal contract for the sale of the barrel business by the partnership to Rheem Manufacturing Company of California, assignee from Jones of the January stock option (R. 64a, 145a). The contract was delivered, exchanged and became binding on the parties thereto July 22, 1937 (R.

129a, 130a), after being signed by all five members of the partnership on that day (R. 246a), although the last sheet of the uncompleted, and as yet unfinished, proposed contract had previously, on July 17th, been signed by the prospective purchaser's executive while he was on a trip east and left in escrow with his attorneys pending conclusion of the negotiations (R. 64a-65a). Title under the contract passed from the partnership to Rheem in August, 1937 with closing adjustments computed, as thereby required, to July 30th. The deposit monies were paid by check of the purchaser dated and certified July 20, 1937, delivered to the partnership at contract closing July 22d (R. 215a) and the balance of the purchase monies were on August 6th also paid to the partnership (R. 220a-236a; 247a). The capital contribution of the partners to their firm was their individual interest in the first liquidating dividend. The profits from the business operations subsequent to July 17, 1937, besides the net capital was distributed by the partnership to its members in accordance with their stake in the partnership enterprise (R. 73a-74a; 188a; 63a). The January option was not exercised prior to the execution or delivery of the July 22d contract of sale (R. 128a) either directly or indirectly. Other distributions by the petitioner as required by the July 15th plan were made to its stockholders (R. 101a, 80a, 247a).

The partnership reported the sale to Rheem in its 1937 income tax return. The petitioner reported the distribution of its business and other distributions made during 1937 under the plan in its separate tax return for 1937.

Gain from the sale of the business assets to Rheem was attributed by the Commissioner to the petitioner and thereon was based his determination of deficiency (R. 251a-252a). On review, The Tax Court sustained the Commis-

sioner's determination with respect to the sale, but found a number of other errors and redetermined the deficiency in a reduced amount (R. 263a, 256a-261a) and its decision was affirmed on appeal to the Circuit Court.

II. Statement of the Basis of the Jurisdiction of this court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C. §347(a). The petitioner has complied with Section 8 of the Act of February 13, 1925; 28 U.S.C. §350. The judgment of the circuit court below (R. 271) was entered on July 21, 1944; its decision was filed on that day. This petition is filed within three months thereafter.

III. Questions Presented.

The principal question presented is:

Whether the sale of business assets to Rheem Manufacturing Company of California may be attributed for tax purposes to the petitioner corporation and the gain therefrom taxed to it, as determined below, or whether it must be treated as made and reported namely as a partnership transaction taxable to the partners?

Subsidiary questions are:

Whether there is any evidence tending to sustain the court's conclusion that petitioner's conveyance and transfer of business assets to the partnership was intended by the petitioner as a means of transferring those assets to the ultimate purchaser?

Whether any evidentiary fact or finding supports the conclusion of the courts below, that petitioner's transfer of business assets may not be regarded as a distribution in liquidation?

Whether there is any evidentiary fact or finding that tends to support the courts' conclusion that the ownership of business assets by the partnership must be disregarded?

IV. Reasons Relied on for Allowance of Writ.

1. The judgment sought to be reviewed is erroneously based on inferences for which there is no substantial support in the record or findings. Lacking such support, it was improper and reversible error for the courts below to attribute the sale to the petitioner. The *negotiations* which started July 9th *to change* the January *option on shares* into a *firm contract on assets were* still *uncompleted* at the time of the first liquidating dividend distribution on July 17, 1937, when the petitioner distributed its business assets to the partnership. The partnership was therefore under no legal obligation to dispose of the same upon the terms which eventually were reached and embodied in the contract of sale to Rheem.

2. The decision below, rendered by the Circuit Court of Appeals for the Third Circuit, is in sharp and direct conflict with decisions of other circuit courts of appeals:

(a) In the fifth circuit, in *Court Holding Company* v. *Commissioner of Internal Revenue* (decided July 11, 1944, ten days prior to the decision of the third circuit below), 143 F. 2d 823, reversing 2 T. C. 531. There the respondent specifically relied on The Tax Court decision in the instant case, referred to its unofficial report (1943-1944

P. H. Tax Court Memorandum Decisions Service ¶43-112) and called attention to the undetermined appeal therefrom. There The Tax Court had attributed to a corporate petitioner the sale of its sole asset consisting of an apartment house which had been consummated under a written contract of sale executed by its stockholders three days after they had received title thereto pursuant to a liquidating dividend distribution. Except for the name of the vendor the contract was in form and substance identical with one negotiated by and between the petitioner and the same purchaser, immediately before the liquidation resolution; the stockholders names were merely substituted for the corporation's name. At the time and place previously set for signing the corporate sales contract, the petitioner had refused to go ahead with the deal on account of the large income tax that would be involved and instead proceeded to liquidate and permit its stockholders to make the same deal. On appeal the Circuit Court for the Fifth Circuit reversed on the ground that the oral contract of sale did not bind the purchaser under Florida laws and that at the moment of conveyance to the stockholders, neither petitioner nor stockholders were bound by any corporate obligation to sell to the purchaser.

In the fifth circuit in *Commissioner* v. *Falcon*, 127 F. 2d 277, affirming 41 B.T.A. 1128. There the basic terms of a proposed sale by the petitioner corporation to an ultimate purchaser of certain leases owned by the corporation had all been agreed upon. The corporation later decided not to go ahead with the deal on account of the large tax consequence thereof to it. Instead it distributed the leases to its stockholders, who thereupon entered into the pre-negotiated deal. The contention of the Com-

missioner that the sale be deemed made by the stockholders as agents for the corporation and hence attributed to the corporation was overruled on the ground that there was no sales contract in existence when the distribution was made.

The test of separate recognition underlying the above two stated cases in the fifth circuit, but disregarded in the case at bar in the third circuit, was: At the time of the liquidating distribution were the shareholders free to choose whether or not to perform the proffered contract with respect to the distributed assets? If the corporation at the time of liquidation was under no legal liability to complete the bargain with respect to the distributed assets which ultimately eventuated, it was there held that the sale by the corporate distributee may not be attributed to the corporation.

(b) In the second circuit in *Chisholm* v. *Commissioner*, 79 F. 2d 14 (c. d. 296 U. S. 646), involving grant of an option by stockholders to purchase their stock, advice by optionees of an intention to exercise the option; ensuing formation of a partnership by optionors with a capital of the contributed shares for the avowed purpose of escaping taxes due on a prospective sale. The circuit court reversed the Board of Tax Appeals and gave separate recognition to the individual act of partnership formation notwithstanding the inevitable short time ownership of those assets and ensuing sale, on the ground that notice of intention to exercise the option was not the equivalent of an actual exercise thereof—the option was an offer to sell—not a contract for sale. Sellers became bound only when the price was tendered at which time the partnership owned the asset. The business purpose of the part-

nership was thus given separate recognition even though the partnership was bound to perform if optionee so elected. The courts below were clearly in error in distinguishing the *Chisholm* and *Falcon* cases (*supra*).

3. The decision sought to be reviewed ignores the tests for determining corporate intention underlying corporate distribution of property, which have been recognized and established by a long line of other Tax Court decisions. *Jemison*, 3 B.T.A. 70; *Conservative Gas Co.*, 30 B.T.A. 552; *Dudley* v. *Commissioner*, 15 B.T.A. 570; *Clara M. Tully Trust*, 1 T.C. 611; *Fruit Belt Telephone Co.*, 22 B.T.A. 440; *George T. Williams*, 3 T.C. 1002.

4. The writ should be allowed to correct the erroneous decision and judgment of the court below, and to permit adequate consideration and determination of questions common to the *Court Holding Company* case in the fifth circuit (*supra*) and the instant case in the third circuit: In the *Court Holding Company* case a petition for a writ of certiorari has been docketed by the Commissioner with this Honorable Court on October 11, 1944 entitled "No. 581. Commissioner of Internal Revenue, petitioner, *v.* Court Holding Company, respondent".

5. There is a marked tendency in the third circuit (illustrated by the decision below) and in some divisions of The Tax Court itself (as is illustrated by the four dissents in *Hobby* v. *Commissioner*, 2 T. C. 980) to ascribe to every conceivable sequence of events an integration, purpose or unity that was never remotely contemplated by the moving parties. The pendulum set in motion by the doctrine of the Dobson case (*Dobson* v. *Commissioner*, 320 U. S. 489) has been swung to such an extraordinary de-

gree, that every corporate dissolution, no matter how bona fide in conception, is met by the Commissioner with a cry of sham, subterfuge or meaningless interim ownership, if it chance that succeeding events show a further disposition of the assets acquired. In every day experience a great many corporate enterprises are in existence whose stockholders or directors have received, or are open to receive, offers for the purchase of their shares or assets. What legal inferences may be drawn, in the present confused state of the decisions, if they choose, with the utmost good faith, to proceed with orderly liquidation and distribution? Dare they commence negotiations either in an individual or corporate capacity before liquidating steps have been (1) initiated or (2) completely consummated, without subjecting the corporation to a tax liability which the Congress never contemplated by its statutory enactment? A clarification by this court of the rules of law applicable to the situation disclosed by the *Court Holding Company* and *Meurer* cases is necessary to reduce the present confusion and conflict. Although Section 115(c) of the 1936 Revenue Act is involved in the instant case, its liquidating plan provisions are still in force without change except for an extension of the period of liquidation from two to three years.

Prayer

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit commanding that court to certify and send to this court a full and complete transcript of the record and of the proceedings of said circuit court had in

this case numbered and entitled on its docket "No. 8520 Meurer Steel Barrel Co. Inc., petitioner *v.* Commissioner of Internal Revenue, respondent", to the end that this cause may be reviewed and determined by this court and that the decision and judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief as may be just and proper.

Dated, New York, October 18, 1944.

MEURER STEEL BARREL CO. INC.,
Petitioner,
By EMANUEL A. STERN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1944

No.

Meurer Steel Barrel Company, Inc.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit rendered by McLaughlin, Circuit Judge, concurred in by Dobie, Circuit Judge and Kolodner, District Judge (R. 265-271) is not yet officially reported. The memorandum findings of fact and opinion rendered by Sternhagen, Judge of The Tax Court of the United States (R. 238a-263a) is not officially reported but is unofficially reported in 1943-1944 P-H Tax Court Memorandum Decisions service, ¶43,112 and a memorandum thereof appeared in '433 CCH, ¶7239, M.

Grounds on Which Jurisdiction is Invoked

The basis of this court's jurisdiction is set forth in the petition.

Statute and Regulations Involved

Revenue Act of 1936, Section 115(c) and Regulations 94, Article 22(a)-21 are involved. They are printed in Appendix B attached.

Statement of the Case

Petitioner in 1936 was a New York corporation engaged in the business of manufacturing steel barrels with a plant in Newark, New Jersey. It had 14 stockholders, principally members of the Meurer and Young families, besides one Charles L. Jones, who had 2,000 common shares out of 5,000 shares issued and received by him incident to sales increase (R. 266). Petitioner's general counsel, Emanuel A. Stern, represented Margaret C. Meurer and her daughter, Mae F. Meurer individually (R. 266). Mrs. Meurer was president of the company (R. 241a). Jones at that time consulted Stern regarding an option on all outstanding shares of petitioner for the purpose of selling them on his projected trip west (R. 266; 239a). Negotiations between Stern and Jones commenced in August 1936 and ended on January 12, 1937 with the execution and delivery of a unilateral written option grant from all shareholders of record as vendors to Jones as optionee for a fixed price per share within a given time (R. 239a; 266). The option recited that the optionee "is desirous of obtaining an option to acquire (directly or indirectly as hereafter set forth), all the assets and goodwill" of the petitioner (R. 150a; 239a; 266),

excepting securities and a patent claim owned by the petitioner, described as "exclusions" (R. 240a; 266).

The option grant specifically covered shares of stock not business assets, and in the event of its exercise, the optionors were free, according to its terms, to deliver to optionee, either shares of petitioner or shares of a new corporation to represent petitioner's assets, other than the "exclusions" (R. 150a).

Time was expressly declared to be of the essence of the option (R. 154a); it was not exercised within the given 90 day period (150a); but its period was extended from time to time at the request of optionee or his attorney (R. 241a; 242a).

A comprehensive detailed plan for complete liquidation of the petitioner in a period not running beyond two years from the close of the taxable year 1937 was formally adopted on July 15, 1937 at an adjourned stockholders' meeting first called by notice issued June 28, 1937 to which the bulk of the shareholders had consented in advance July 6, 1937; in principle the stockholders had previously approved liquidation July 9, 1937 (R. 46a-47a; 266-267, 161a-165a).

The plan of July 15, 1937 provided for a series of distributions of which the first was to be a liquidating dividend in kind of the business assets of the petitioner distributable July 17, 1937 (R. 242a). Implementing resolutions providing for such distribution were adopted and the actual distribution by deed of conveyance from the petitioner occurred at noon of July 17, 1937. At the time fixed for such distribution the only persons entitled thereto were five individual stockholders who had formed a copartnership evidenced by memoranda in writing, certificate of trade name, opening of books of account,

and related acts (R. 244a, 188a, 190a). To the five partners the petitioner, on July 17, 1937, transferred the assets of its barrel manufacturing business, including the right to use its name, of a then determined net value of $500,000 (R. 245a). The transfer was by means of separate instruments of conveyance and assignment (R. 192a; 195a) and simultaneously the partnership assumed all of petitioner's stated liabilities incurred prior to the transfer date as required by the resolutions respecting the distribution (R. 242a, 243a, 245a, 197a). The assumption instrument executed by the partners on July 17, 1937, recited that the distribution had occurred pursuant to the plan for complete liquidation and dissolution adopted July 15, 1937 (197a). Simultaneously with execution and delivery of such conveyance and bill of sale, certificates of all outstanding shares[1] were cancelled and redeemed to the extent of the declared value of the first liquidating dividend. The partnership operated the business from July 17, 1937 to August 6, 1937 and the profits of the business derived by the partnership from July 17th to July 30th were distributed to the partners.

In the meantime, on the date of the corporate meeting at the Meurer home on Long Island July 9, 1937 (R. 164a, 241a) Stern was approached in New York by Green and an associate, member of the New York law firm of Breed, Abbott & Morgan, representing Jones, with the request for a further extension of the January option on shares, pending negotiation of an agreement contemplating the purchase of business assets instead of shares.

1. A relatively small number of certificates owned by a deceased shareholder were not cancelled until later, although there was uncontradicted testimony that sale of said minority shares to the partnership was orally concluded prior to the distribution, with the legal details completed later (R. 245a, 246a; 103a).

The attorneys did not then disclose who the prospective purchaser (R. 242a) was. However they did not wish to carry out the purchase of a manufacturing plant under a document such as the share option (R. 242a). The option was extended to July 19, 1937 "in order that terms of a contract of sale could be negotiated" (R. 267) and a further extension was granted as requested on July 17, 1937 (R. 245a). Negotiations were conducted exclusively by and between Stern for prospective vendors, and Green and associate, for prospective purchaser. From the outset of the negotiations the purchaser was made aware of the liquidation of the petitioner, formation of the partnership, transfer of the barrel business to the partnership and intention of the partners to make the sale, if any eventuated. It was immaterial to the purchaser from whom the assets were purchased "but assets and not stock were what it wished to buy" (R. 246a). Its attorneys demanded and received proof that the partnership owned the assets (R. 246a). The negotiations were concluded on July 22, 1937, on which day the five partners signed as vendors and the contract was delivered (R. 246a). The contract of sale delivered on July 22d differed in its terms from the option agreement of January 12, 1937, principally in the respects indicated in the chart attached as Appendix A, although no finding with regard to such variances was made below. The option and contract are both in evidence (R. 150a-156a; 199a-214a). The purchaser's attorney testified that he did not consider his client obligated until the contract was actually delivered on July 22d (R. 129a-130a) and that it contained "quite numerous changes from the terms of the deal as contained in the option and also considerable additions to the deal" (R. 142a). Both vendors' attorney and pur-

chaser's attorney testified that all terms of the contract had not been agreed upon at the time the last sheet was signed by the purchaser's executive while he was on a trip east July 17, 1937 (R. 267; 64a, 65a, 87a, 88a, 129a-130a, 138a, 142a); that such signature was accompanied by an escrow delivery to purchaser's attorney.

Further distributions by the corporation to its shareholders continued from time to time pursuant to the July 15th plan (R. 242a, 253a; 267). Separate distributions by the partnership of capital and income were made to the partners personally (R. 72a, 74a, 249a-250a). The interest of the partners in the partnership was proportionate to their contribution of shares or liquidating dividends, as the case may be, and it was on that basis that the distribution by the partnership occurred (R. 250a, 237a).

The deposit monies of $50,000 under the contract of sale between the partnership and Rheem was paid by check to the order of the partnership and deposited in the partnership account (R. 215a-216a). All subsequent payments under such sales contract as well as the notes and mortgage securing the same, went directly to the partnership and were distributed to the partners through the partnership account (R. 223a).

The business assets were transferred by the partnership to the purchaser on August 6, 1937, with adjustments computed to July 30, 1937 pursuant to the contract terms. Numerous title documents delivered at the closing showed the title at the time of such final closing to be in the partnership and derived from the petitioner under the adopted July 15, 1937 plan of liquidation (R. 220a-236a; 246a).

Petitioner engaged in no further business after July 17, 1937; it proceeded to collect its accounts, dispose of its securities, pay its debts and distribute its remaining assets

within its scheduled time fixed by the plan and minutes (R. 105a, 101a, 80a, 247a). The Secretary of State at Trenton, New Jersey, was informed on ~~that day~~ July 17, 1937 of its intention to discontinue business (R. 246a).

Dissolution Certificate was issued by the Secretary of State October 24, 1938 (R. 247a).

Reduction in the deficiencies effected by The Tax Court decision resulted from that court's sustaining five of the contentions of the petitioner respecting errors of the commissioner (¶¶3, 4a, 4b, 4d and 5 of opinion, R. 247a), no longer involved. The Circuit Court for the Third Circuit affirmed with opinion.

Specification of Errors

The Circuit Court of Appeals and The Tax Court erred:

1. In holding that petitioner at any time had as an end in view, the sale of its business assets to Rheem, or shaped events to accomplish that end.

2. In failing to hold that the petitioner's conveyance of business assets to the partnership required separate recognition as one of a series of distributions under an adopted plan of complete liquidation, within the scope of Section 115(c) of the Revenue Act of 1936.

3. In holding that petitioner at any time participated in negotiations for the sale of business assets to Rheem.

4. In concluding that the partners' ownership of business assets was not bona fide, absolute and unrestricted.

5. In distinguishing, instead of holding applicable and following, the second circuit court decision in *Chisholm* v. *Commissioner,* 79 F. 2d 14, and the fifth circuit court decision in *Commissioner* v. *Falcon,* 127 F. 2d 277.

6. In attributing to the petitioner, the sale of business assets made by the partnership to Rheem.

7. In adding to petitioner's income for 1937 the partnership gain on sale of their business assets to Rheem, and redetermining a deficiency, instead of overpayment, in income tax and excess profits tax for 1937.

8. In affirming the decision of The Tax Court.

Summary of Argument

The principal question is whether the sale of business assets involved here is attributable to the corporation rather than to its stockholders who received such assets as a distribution in kind in connection with petitioner's dissolution under a previously adopted plan. The Tax Court erroneously concluded that the sale was attributable to the petitioner for tax purposes and based it on erroneous inferences, without a shadow of support in the evidence: (1) that each event in the series leading to ultimate sale of the assets to Rheem was a step (R. 255a) in a unified integrated plan on petitioner's part to make such sale, although the declared purpose and expressed intention were directly to the contrary; (2) that the partnership was merely a straw entity (R. 254a) concocted as an interim ownership of form but not substance that should be disregarded, which inference was in direct contradiction to the executed documents and related evidence of intention. The Tax Court rejected all relevant evi-

dence to reach its erroneous inference (3) that there was a pervading corporate intention to sell which preceded and dominated the liquidation instead of finding, as impellingly required by the undisputed evidence that a fixed and declared intention on petitioner's part to liquidate preceded, and was consummated before, any individual intention on the stockholders' part to sell was brought to fruition.

Though wide latitude is allowed to The Tax Court in integrating or recognizing as unrelated apparently separate events and transactions, the Dobson case (*Dobson* v. *Commissioner,* 320 U. S. 489), it is respectfully submitted, has not gone to the lengths urged below, of forming a cloak to cover an utter and complete failure of proof in support of the court's drawn inferences.

ARGUMENT

I

No substantial evidence supports the Court's inferences upon which have been projected its erroneous conclusion attributing the sale to the petitioner.

Every element required by sub-section (c) of Section 115 of the Revenue Act of 1936 (Appendix B) is to be found in what actually was done by petitioner, namely a statutory distribution whereof the first of a series in complete cancellation and redemption of all petitioner's stock was effected in accordance with a duly adopted and implemented bona fide plan of liquidation.

1. There is *no evidence* whatever *of* any *negotiations* for the sale of business assets by or *on behalf of the peti-*

tioner at any time either before or after the liquidating dividend distribution.

2. The first *liquidating dividend* was declared by the petitioner, and *distributed* and accepted by the partnership *prior to* execution and delivery by the partnership of the *contract of sale* of the business assets involved therein. Negotiations with respect to the acquisition of the business assets by Rheem were not concluded by the partnership and purchaser until five days after title had vested in the partnership. The purchaser was informed —at the outset of its negotiations for a contract to purchase business assets, instead of shares of stock—of the impending acquisition of title by the partnership; the purchaser was kept informed of the corporate proceedings which vested such title in the partnership; the purchaser demanded and received proof of the partnership title acquired under the liquidation plan; the purchaser at all times during the negotiation of terms knew that an eventual sale, if consummated would be from and by the partnership and not the petitioner; the contract of sale was made and signed by the five individual members of the partnership as such and not by petitioner.

3. Transfer of the business assets to the partnership was made and accepted as a declared step in a series of liquidating distributions under a previously adopted plan of liquidation contemplating such complete liquidation and dissolution within two years from the close of the taxable year when so adopted. It was set in motion by implementing resolutions adopted July 15, 1937, seven days before the terms of the sales contract were mutually agreed upon and the contract delivered. The plan of dissolution was approved in principle July 9, 1937, pur-

suant to proxies executed by the stockholders July 6, three days before the negotiations for the sale of assets had even begun; the initial shareholders' meeting of July 9th had been called by notice issued June 28th, eleven days before commencement of the negotiations (R. 161a-166a).

4. The option grant of January 12th bound the shareholders individually, not the corporation; it covered shares of stock, not business assets; it was unilateral and bound optionors, not optionee; during its negotiation the shareholders' attorney had informed shareholders that he would never recommend sale by the corporation because "of the possible extraordinary taxes that would have to be paid."

5. No obligation either of Jones or his assignee to exercise the January option was ever assumed or disclosed prior to the time when title to the business assets vested in the partnership.

6. There is no evidence that at the time of title vesting on July 17th, either the partnership or the petitioner was under any oral or written obligation to sell either business assets or shares to Jones or his assignee upon the terms which ultimately were embodied in the concluded contract of sale. The ultimate sales contract which emerged at the conclusion of the negotiations July 22, differed in a number of important respects from the provisions of the option agreement. The chart attached as Appendix A shows the principal variations. One important variance was with relation to the $50,000 liquidating damage clause in the event of the failure of the purchaser to complete; it was present in the option grant but absent from the sales contract. There is no showing what-

ever that the purchaser was ever ready to exercise the original option grant, either on shares or equivalent assets, without such variances.

7. The alternative desire of optionee with relation to a "direct" acquisition of assets, expressed in the January grant, was not a burden of optionors at that time—nor did optionors' subsequent acquiescence therein, *after* they were free so to do or not to do, as they might elect, *i.e.,* after distribution in liquidation, relate back so as to bind them thereto, from the option date. This subsequent acquiescence made the ultimate contract an entirely new deal, regardless of whether so termed in the contract itself. The option grant bound optionors only to the "indirect" alternative, *i.e.,* "shares" of stock (R. 150a, 151a).

8. The partnership was organized for and served a useful business purpose during its ownership and operation of the barrel business—it was not a paper conduit for transfer of assets from petitioner to Rheem, and was not so intended. The learned courts below failed to note that even the original option grant contemplated an alternative method of delivery of the subject matter of that option "shares", by choice of the optionors alone, namely their delivery of shares of another corporation which they were free to organize to acquire the business assets represented as the direct objective of the optionee's desire (R. 150a. ¶2d). The true test of ownership significance lies not in the length of its duration but in the genuineness thereof: here the partners' ownership of the business assets was not a hollow, inert, vacuous tenure, but represented real activity in the barrel business. This it owned, operated and ran from the time of its acquisition under the liquidating dividend distribution, July 17th at noon, to its

ultimate transfer thereof August 6th. The first five days of such ownership from the 17th to the 22d was a period when no one could say that the long protracted negotiations would ever culminate in an executed contract of sale. When the option grant was given, all that was contemplated under its terms in order to consummate the deal expressed thereby, was a simple notice of exercise thereof accompanied by a $50,000 down payment. At no time did the optionee's assignee ever evince an intention or readiness to perform that simple act or otherwise subject itself to the risk of losing the $50,000 down payment as liquidated damages in the event it failed to perform under the purchase contract that would follow the option's exercise. The remaining period of the partners' business life, so far as it concerned barrel operations, was, it is true, hedged in by voluntarily assumed conditions under the July 22d contract, safeguarding the purchaser against wastage, such as any prudent buyer might well require. The risks of the partnership business activity, however, were borne, and the profits accrued, not to the petitioner, nor to the optionee, but to the partnership itself. Its scope and volume of operations during such fortnight period of activity was not insignificant—gross receipts were $232,-068.58 and inventory sale was $176,100, against a corresponding initial inventory of $139,174.55 at the commencement of partnership operations. Green, the purchasers attorney, testified repeatedly under direct, as well as cross-examination, that he dealt with the partners through their attorney, believing them in fact to be the owners after the first step in liquidation had gone through, that he went through no "forms", had no hand in the dissolution itself and demanded and accepted proofs of the partners ownership precisely as he would in any case

where he represented a prospective purchaser in a matter of importance and wanted to be certain he was dealing with the right parties (R. 139a-140a).

If the partnership were intended as a mere conduit for the corporation it would have been wholly unnecessary for the partners to acquire all the other outstanding shares or their rights in the first liquidating dividend.

9. Nothing in the record permits the inference indulged in by the courts below that the petitioner intended a distribution of proceeds of ultimate sale of the business assets as the liquidating dividend instead of the net value of those assets at the time of distribution. The expressed intention of petitioner was to distribute business assets, not the proceeds of sale of such assets. The assets when delivered to the partnership were free assets, unburdened by any obligation on the part of the petitioner with relation to their retention or sale.

10. Distribution of the business assets by the petitioner to the partnership was absolute, unconditional and unrestricted. Simultaneously with such conveyance all certificates of shares of the capital stock of petitioner were cancelled and redeemed to the extent of the declared value of the first liquidating dividend (R. 246a) so distributed.

These acts of conveyance and share reduction were irrevocable. Thereby the tax consequences to the stockholders became fixed. They were subjected immediately to an admitted liability for tax on the gain reflected by the difference between the cost of their shares and the value of the distribution. Such tax consequence was not dependent upon the ability of the negotiating parties to reach a meeting of minds. Moreover there was no

obligation on the partners' part at the time the distribution occurred to depart to the slightest extent or least degree from the terms of the January option grant. Had they held to their terms and the purchaser failed to recede from his demand for substitution of assets for shares, the partners would still have been liable for the tax consequences of their receipt of the liquidating distribution of July 17th. All these necessary implications and consequences are entirely ignored by the inferences, conclusions and implications of the courts' reasoning with respect to the transactions involved.

The court is not called upon to consider what inference might have been drawn if the option were, in fact, exercised according to its terms—which it was not—after, or before the corporate distribution had occurred. Even there however if the second circuit decision of *Chisholm* v. *Commissioner* (79 F. 2d 14) had been followed, the sale necessarily should have been attributed to the partnership as reported and not to the petitioner.

The partners were not agents of the petitioner when they sold their business assets to Rheem. There was no oral or written contract of agency nor any of the usual incidents of an agency relationship. The court erred in implying an agency in the absence of any proof thereof. *Moline Properties Inc.* v. *Commissioner,* 319 U. S. 436.

II

The judgment of the Circuit Court below is erroneous, in conflict with decisions of other circuits and irreconcilable with other Tax Court decisions.

The Commissioner's original explanation of the deficiency assessment against the petitioner (R. 28a), The Tax Court opinion (R. 239a, 253a) and the Circuit Court opinion (R. 266) all stress the option grant's recital of the *optionee's desire* as the keystone of the structure upon which they project *petitioner's* alleged obligation as petitioner's end in view and to which they subordinate all subsequent occurrences. This unmistakable error arises: (1) from failure to distinguish between the two alternatives of optionee's desire and the one indicated choice of optionors. Optionee wanted assets, either directly by transfer thereof or indirectly by means of shares of a corporation which would own those assets. His choice was not expressed in the unilateral option grant of January 1937, except as may be gleaned from the "Whereas" clause reference to "as hereinafter set forth". No choice is indicated in any succeeding portion of that instrument except the indirect one of "shares" (R. 150a-156a). On the other hand it was not disputed that when Jones started the discussions regarding an option, he asked only for an option on shares. The natural inference arises therefore that the express reference to assets was inserted as a means of providing a yardstick for the variable price payable for the shares according to the changes in net assets that would occur between option date and prospective settlement date. It was not a short time contract; the petitioner was a business concern; it was nat-

ural that it would not stand still; its value—the value of its shares—would fluctuate according to the value of its assets in the interim; (2) from failure to note that petitioner could not be bound by the option instrument which was not executed by it and which in terms of grant covered shares only. Petitioner's shares were all issued, therefore the stockholders were not speaking for petitioner but for themselves. This clearly appears from their listing of their holdings alongside their signatures to the option grant (R. 156a); (3) from failure to give heed to the right of election reserved to optionors exclusively, namely to substitute new shares for petitioner's shares (R. 150a); (4) from failure to recognize that optionors, when they accepted the liquidating distribution six months later, were not yet bound to substitute direct assets for the shares. Therefore at the latter time, neither the optionors nor the petitioner could have had an asset sale in view as a determining factor, if it were merely based on a hope than an ultimate deal would emerge. There had been too many extensions requested to give any assurance of a deal eventuating—there were a large number of changes constantly being made—no one knew to what lengths the prospective purchaser might press. If in the face of this clear record of absolutely no participation on petitioner's behalf in the preceding negotiations, *a plan of sale* can be evolved by judicial inference of intention directly opposite to the *plan of liquidation* which the parties meticulously provided for, implemented and carried out—without regard to the ensuing fate of the assets distributed—then indeed the statute protecting *bona fide* liquidations against corporate income tax has lost its meaning and become a dead letter.

The decision and judgment below deprive petitioner unlawfully of the benefits of Section 115(c) of the Revenue Act of 1936. In the case at bar all concomitants of a *bona fide* liquidation were present: a curtailment of activities; an orderly process of cessation of those activities; a definitive two year plan adopted and adhered to; retirement and cancellation of stock against distribution of the liquidating dividend in kind; operation of the business by the recipients of that dividend, before definitive terms with respect to the sale thereof had been mutually agreed upon, between the partners and the purchaser; absence of any strings upon the liquidating dividend distribution that would preclude the recipients from choosing whether or not to sell assets instead of shares. They were under no obligation to sell those assets prior to the making of the July 22d contract of sale. The unilateral option of January obliged them to sell shares of stock only, regardless of the fact that it was immaterial to the optionee at that time whether he obtained shares or assets. That the optionee's assignee had a different view, and desired assets only, not shares, in July, has no influence upon the determination of the *bona fides* of the transactions of January or July.

The courts below overlooked the fact that in the absence of a commitment by the corporate petitioner with relation to its business assets, the law does not inhibit the stockholders from making anticipatory arrangements with respect to property they expect ultimately to receive.

In the recent case of *George T. Williams* v. *Commissioner* (decided June 19, 1944), 3 T. C. 1002, it was held that an agency relationship may not be implied from the mere fact that a sole stockholder of a corporation in

process of dissolution contracts as an individual to sell property which he expects to receive as a distribution in liquidation. There no agreement to sell the assets was contemplated to be made, nor was any made, until after corporate action with respect to distribution was completed, although the negotiations occurred simultaneously. That decision expresses a sounder view of applicable law, than underlies the decision at bar.

The decision below is in sharp conflict with the recent fifth circuit court decision in *Court Holding Company* v. *Commissioner,* 143 F. 2d 823, reversing 2 T. C. 531. There The Tax Court attributed the stockholders' sale of a distributed asset to the corporation from which derived, and the Circuit Court held it to be reversible error since concededly the contract of sale was not executed, nor were the stockholders legally bound to make the same, until after the distribution had occurred. The time element was held to be the controlling one, although negotiations were concededly conducted on petitioner's behalf to the very point where a finished draft of a contract emerged with all terms satisfactorily agreed upon, but the corporate officers—who were also the sole stockholders—changed their minds after the parties had met for the purpose of signing the papers, and instead proceeded to liquidate, in order to reduce the impact of the expected income tax. The stockholders' names were simply substituted for that of the corporation as vendor and the substitute contract was signed almost immediately after the distribution was effected. In the *Meurer* case at bar, there is absolutely no proof of any negotiations whatever conducted by the petitioner or on its behalf. The shareholders' attorney had given notice some six months earlier, that he would never recommend a sale by the corporation. That was long before any prospective

purchaser had appeared on the scene. Moreover in the instant case, no understanding as to all the terms were reached until five days after the distribution had occurred. Although the Meurer Tax Court decision (unofficially reported) was cited in the Commissioner's brief before the Circuit Court, it was ignored and the reversal was on the express authority of *Commissioner* v. *Falcon* (*infra*) in that circuit.

In *Commissioner* v. *Falcon*, 127 F. (2d) 277 (C.C.A.—5; affirming 41 B.T.A. 1128), Falcon Company, on February 8th (1934) received a written offer from Texas Company (outside interests), for certain oil and gas leases which it owned. Negotiations then followed and continued to February 19th, when Falcon's directors decided not to sell to anyone, on account of the large taxes involved. Instead on February 23d the stockholders adopted a resolution providing for a distribution of the leases to them as a partial liquidating dividend, and on the same day the leases were so transferred by absolute, unconditional conveyance against reduction of the outstanding stock. Later that same day, the stockholders, as the new owners, received a formal written offer from the Texas Company, which referred back to the prior negotiations with the corporation. The stockholders thereupon made a contract of sale with the Texas Company and conveyed the property. The Commissioner contended that the sale was made by the Falcon Co., or if not by it, then by its stockholders merely as agents. The Board on the authority of the *Chisholm* case (*infra*) held otherwise and was affirmed, specifically on the ground *that there was no sales contract in existence* when the liquidating distribution took place. The Circuit Court in its opinion in that case followed the second circuit in *Chisholm* v. *Commissioner*, 79 F. 2d 14,

and held inapplicable the case of *Embry* v. *Glynn*, 116 F. 2d 682 (C.C.A. 6), on which the greatest reliance was placed by the respondent below.

The second circuit court decision of *Chisholm* v. *Commissioner*, 79 F. 2d 14, is an additional authority for the required reversal of the decision below. The courts below in the case at bar erred in distinguishing that case. Judge Learned Hand, in his opinion said (p. 15):

> "The Commissioner first argues that the sale was made when Krauss & Co. notified the five sellers that it would take up the option. Clearly this was not the case; the option was an offer to sell, not to contract to sell; it required payment; not a promise to pay, and the notice, not corresponding with the offer, was legally a nullity."

At bar the optionee was never willing to exercise the option according to its terms. Even if it were, its mere notice of readiness so to do would not have been sufficient to constitute a contract, if the doctrine of the *Chisholm* case prevails. See also *Jemison*, 3 B.T.A. 70; *Conservative Gas Co.*, 30 B.T.A. 552; *W. B. Hobby* v. *Commissioner*, 2 T. C. 980.

Dobson v. *Commissioner*, 320 U. S. 489; *Gregory* v. *Helvering*, 293 U. S. 465; *Helvering* v. *Elkhorn Coal Co.*, 95 F. 2d 732; *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Commissioner*, 308 U. S. 355, cited in the opinion of The Tax Court or circuit court below, are inapplicable on account of the entire absence of any substantial evidence to support the inferences and conclusions made by the courts below: that *petitioner* at any time had as an end in view the sale of its business assets to Rheem, shaped events

to accomplish that end or participated in negotiations for such sale. The facts briefly marshalled in the foregoing point necessarily required the separate recognition of (1) the first liquidating dividend distribution under the adopted plan of complete liquidation within the scope of Section 115(c) of the Revenue Act of 1936 and (2) the partners' ownership of business assets as *bona fide,* absolute and unrestricted.

The respondent below relied strongly on the sixth circuit case of *Embry Realty* v. *Glenn,* 116 F. 2d 682, the third circuit case of *S. A. Macqueen* v. *Commissioner,* 67 F. 2d 857, the fifth circuit case of *Taylor Oil Gas Co.* v. *Commissioner,* 47 F. 2d 108 and the fourth circuit case of *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327. Upon analysis it will be found that in each instance one or more of the following significant elements were present rendering those cases inapplicable: (a) the transfer by the corporation was conditional, not absolute; (b) the distribution was intended to apply to the proceeds of ultimate sale of the property distributed; (c) the corporation or its stockholders were irrevocably committed to all terms of a proposed sale of specifically identifiable property previously accepted by an optionee or prospective purchaser before the distribution of the liquidating dividend was declared or carried out; (d) the transfer was expressly to a trustee to carry out a previously arranged sale; (e) the initial transferee clearly acted simply as a conduit without performing any business purpose or function whatever, or (f) other factors were involved clearly showing a lack of *bona fides* in the distribution, such as acceptance of the distribution at a grossly unfair valuation.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its appellate and supervisory jurisdiction and that to such end a writ of certiorari should issue.

N. Y., October 19, 1944.

Respectfully,

EMANUEL A. STERN,
Counsel for Petitioner.

Appendix A

The contract of sale delivered on July 22, 1937 (R. 129a-130a, 199a, 64a), differed in its terms from the option agreement of January 12, 1937 (R. 150a, 43a), principally in the following respects:

Option (Exhibit 1)	Contract (Exhibit 19)
1. Shares of capital stock optioned (ppg. 1st).	1. Business assets contracted to be purchased by optionee-transferee (Ppg. 3d, 25th).
2. Shares held by 14 stockholders (1st and final sheets).	2. Assets owned by 5 stockholders (ppg. 2d).
3. $50,000 deposit (ppg. 5th) liquidated damages on default (ppg. 6th).	3. $50,000 deposit (ppg. 1st); No liquidated damage default clause.
4. No restriction regarding petitioners engaging in further business.	4. Covenants that petitioner will not engage in barrel business in New York or New Jersey (ppg. 32d).
5. Balance purchase price payable on closing date in full (ppg. 6th).	5. Purchase price payable half cash and half deferred to day more than 4 months after closing. 25 percent deferment for inventory. No interest on deferred payments (ppg. 6th, 26th).
6. No metes and bounds description; No covenants re title to real property; No reference to violations; No reference to assessments.	6. Metes and bounds description. Express covenants re: Insurable marketable title in fee simple (ppgs. 3d, 9thB, 14th, 16th, 19th, 9thA, 20th); Freedom from violations (ppg. 11th); Freedom from assessments (ppg. 12th).

7. No fire risk assumption; No fire loss cancellation.	7. Fire risk assumed by seller; fire loss cancellation provision (ppg. 18th).
8. No restrictions on operations between option exercise date and closing date.	8. Express restrictions on operations between contract date and closing date (ppgs. 24th, 29th, 30th).

Appendix B

Statutes and Regulations

Revenue Act of 1936:

"§115(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117(a), 100 percentum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation. For the purpose of the preceding sentence, 'complete liquidation' includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding two years from the close of the taxable year during which is made the first of the series of distributions under the plan."

Regulations 94, Article 22(a)-21:

"No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."

(9720)

No. 614

In the Supreme Court of the United States

October Term, 19[illegible]

Meurer Steel Barrel Company, Inc., Petitioner

Commissioner of Internal Revenue

on petition for a [illegible] [illegible] circuit court of [illegible] circuit

[illegible]

INDEX

CITATIONS

617092—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 614

MEURER STEEL BARREL COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 238a–262a) is unreported. The opinion of the circuit court of appeals (R. 265–271) is reported in 144 F. 2d 282.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 21, 1944 (R. 271). The petition for a writ of certiorari was filed on October 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the decision of the Tax Court which held that a sale of the petitioner's assets, which was formally made by five of petitioner's stockholders acting on behalf of all of the stockholders, was, in substance, a sale by the petitioner and that the gain therefrom was taxable to it.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains on profits and income derived from any source whatever. * * *

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 22(a)-19. Sale of capital assets by corporation.—If property is acquired and later sold for an amount in excess of the

cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111–113. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

ART. 22 (a)–21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. * * * Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. * * *

STATEMENT

The facts as found by the Tax Court, in so far as pertinent to the issue presented here, may be summarized as follows:

The petitioner, a New York corporation, had its principal place of business in Newark, New

Jersey (R. 238a). On and prior to July 15, 1937, its shares were held principally by members of the Meurer and Young families (R. 238a–239a). At the end of August, 1936, Jones, one of the shareholders, told Emanuel A. Stern, general counsel for petitioner and manager of the business affairs of Margaret C. Meurer and Mae F. Meurer, two of petitioner's shareholders, that he believed he could sell all of petitioner's shares to a competitor, and would like to have an option on them. Stern conferred with the other shareholders. Negotiations thereafter continued between Stern and Jones and were consummated on January 12, 1937, with the execution of an option agreement by the shareholders, as vendors, reciting that Jones, optionee, was "desirous of obtaining an option to acquire (directly or indirectly as * * * set forth), all the assets and goodwill of (petitioner), subject to all its liabilities, excepting the certain assets and liabilities * * * described as 'exclusions'". (R. 239a–240a.)

Under the agreement, Jones acquired the right to purchase the shares on or before ninety days from date, but items of exclusion, consisting partly of marketable securities owned by petitioner, were reserved to petitioner or the shareholders, depending upon the method of sale adopted (R. 151a). The base price named was $70 a share of preferred and $30 a share of common, totalling

$500,000, subject to certain variations for change in net assets between June 30, 1936, and the closing date. Upon the exercise of the option, the vendors would transfer their shares or were to have the right to cause to be transferred to a new corporation all the assets and good will of the petitioner, excepting the excluded items, and to retain their shares in petitioner, in which event the base price was to be $500,000. In order to exercise the option, it was necessary for the optionee or his assignee to deliver to vendors' counsel notice of election to exercise the option together with a certified check of $50,000 and an undertaking to pay the purchase price to the vendors at the time and place fixed for closing. (R. 240a.)

On the same day, the shareholders agreed in writing to refrain from selling the shares during the life of the option, and appointed a sales committee with authority, *inter alia*, to extend the period of the option from time to time not exceeding six months, to execute sales agreements, and to vote the shares at shareholders' meetings so as to effectuate the intention of the parties and the election of the committee "as to the method of carrying out said sale of assets of said company that may be required to be divested and to enable distribution of distributable interests by liquidating dividend, reduction of capital or otherwise." On April 9, 1937, the sales committee extended the option from April 12, 1937, to July 12, 1937.

In his discussion with some of the shareholders, Stern informed them that he would never recommend a sale by the corporation because of the "possible extraordinary tax that would have to be paid." (R. 240a–241a.)

On July 9, 1937, a special shareholders' meeting was held at the home of the president who then stated that she believed it desirable for the petitioner to retire from its barrel business, that she had conferred with Stern, and that he was about ready to submit a plan. The report of the president was approved and she was authorized to request Stern to submit his plan at a meeting on July 15. On the same day, attorneys, representing Jones and an undisclosed prospective purchaser, told Stern that they wanted to work out a deal under the option, that they did not wish to carry out the purchase of the plant under a document such as the option and therefore requested a further extension of the option in order to negotiate the terms of a contract of sale. The sales committee extended the option to July 19, 1937. (R. 241a–242a.)

On July 15, 1937, Stern submitted his plan for complete liquidation and dissolution of petitioner, and it was approved by the shareholders. The plan included (1) a liquidating dividend in kind distributable July 17, 1937, subject to its liabilities; (2) collection and realization of accounts receivable and other remaining assets; (3) discharging

all obligations of petitioner and assuming payment of some obligations by shareholders, and (4) distribution during January, 1938, of a further liquidating dividend of the net assets on hand January 1, 1938, final distribution to be made on or before December 9, 1939. Resolutions were thereupon adopted to effectuate the plan. (R. 242a.) Consequently a first liquidating dividend was declared of all tangible property, as well as good will and other intangible assets, subject to all liabilities incurred on or prior to July 17, 1937, with certain exceptions not here material.

In order to consummate the sale expeditiously under the Jones option, some of the shareholders transferred their shares to three others and these three, together with two additional shareholders, made a partnership agreement on July 17, 1937, for the stated purpose of engaging, commencing July 19, 1937, in the manufacture of steel barrels at Newark, New Jersey, under the firm name of Meurer Steel Barrel Company. This agreement provided, *inter alia,* that such of the partners or other officers of the corporation as were not taken over by the ultimate purchaser of the business should be entitled to draw salary from the partnership at the rate formerly paid, until the close of the current calendar year. (R. 244a–245a.)

The petitioner transferred to the five partners, acting for all the shareholders (R. 15a–16a), all of the assets comprising its manufacturing busi-

ness, including good will and the right to use its name. The partnership assumed all of petitioner's liabilities incurred prior to July 17, 1937, with certain exceptions not here material. On the same day, Jones assigned his option to Rheem Manufacturing Company and the partners were informed of a "possible opportunity" to dispose of the assets received by petitioner's shareholders. (R. 245a.)

The sales committee extended the option to July 26, 1937. On July 17, 1937, certificates of outstanding shares were cancelled and redeemed to the extent of the "first liquidating dividend". On the same date, Stern wrote the Secretary of State of New Jersey that the petitioner had transferred its plant in New Jersey to its stockholders, as the first step in the process of dissolution, and contemplated presently withdrawing its right to do business in New Jersey. (R. 245a–246a.)

Subsequent to July 9 and until July 22, 1937, Stern and the attorneys for Jones and the purchaser negotiated a contract to amplify the terms of purchase set forth in the option. Stern informed the attorneys of the plan to liquidate the petitioner and to form a partnership to which would be transferred the manufacturing business. To the purchaser it was immaterial from whom the assets were purchased, as assets and not stock were what it wished to buy. Its attorney

demanded proof that the partners owned the assets, and this was furnished him. (R. 246a.)

The contract was signed by Rheem Manufacturing Company on July 17, 1937, and by the partners on July 22, 1937. In it, the purchaser gave notice of its election to exercise Jones' option. The down payment of $50,000 was made by check dated July 20, 1937, payable to the partners doing business as Meurer Steel Barrel Company. The transfer of the assets was to be made on August 2, 1937, and all adjustments computed as of the close of business on July 30, 1937. On August 6, 1937, the partners transferred all the assets comprising the manufacturing business to Rheem Manufacturing Company. That business was conducted by the partnership from July 17 to July 30, 1937, under the direction of Stern and two partners. (R. 246a.)

The Tax Court held that the gain from the sale of assets to the Rheem Manufacturing Company was taxable to the petitioner (R. 256a). Accordingly, it decided that there are deficiencies of $19,415.86 in income tax and $6,157.73 in excess profits tax for 1937 (R. 263a). The circuit court of appeals affirmed the decision of the Tax Court (R. 271).

ARGUMENT

In holding the petitioner taxable on the gain from the sale here, the Tax Court reached the

conclusion that each act in the negotiations was only a step in a "unified integrated plan" to sell the petitioner's assets, and that the partnership was merely a "technically elegant arrangement" to effect such plan and was not organized to retain the assets or to operate the business (R. 254a-255a). This decision, based on findings amply supported by the evidence, and affirmed by the circuit court of appeals, involved resolution of an issue peculiarly within the province of the Tax Court. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231. Moreover, the decision, in so far as it is one of law, is in accord with established legal principles.

The evidence shows that negotiations for the sale were carried on from the beginning by Mr. Stern, petitioner's assistant secretary and general counsel throughout the whole period as well as attorney for some of the shareholders. When counsel was approached in 1936 relative to a sale, he indicated his unwillingness to have the corporation sell its assets because of the income tax which would be imposed on it. Thus, in January, 1937, an option to buy the petitioner's shares was given to a person desiring to acquire its assets "directly or indirectly" (R. 240a). But on July 9, 1937, representatives of the optionee and of the company, which later purchased the assets, advised counsel that the latter would buy nothing but assets. Accordingly, he began to

work with the purchaser's representatives on a contract to sell the assets and such work was carried on simultaneously with that on the plan for petitioner's liquidation which was first discussed at a shareholders' meeting on July 9 and was approved on July 15. The first liquidating dividend, covering the assets involved here, was entered on the books on July 17, and, on the same day, the purchaser signed the final contract of sale. A partnership, composed of five shareholders designated to act for all of the shareholders, was also formed on that day and received a deed covering these assets. The contract of sale gave notice of the purchaser's intention to exercise the option which had been assigned to it, and the down payment of $50,000 was made by the purchaser by check dated July 20. On July 22, the partners signed the contract to sell the assets and, under the agreement, continued in charge of the business only until the end of July. However, petitioner remained in existence until 1938 and the final distribution was not made until that year. (R. 239a–246a.) In view of these facts, the circuit court of appeals correctly held that there was ample basis for the Tax Court's findings and conclusion.

Furthermore, the decision of the court below, as well as that of the Tax Court, is in accord with the principle affirmed by this Court in a variety of contexts that tax consequences flow from the

substance of a transaction, not from the form in which it is cast. *Gregory* v. *Helvering,* 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Griffiths* v. *Commissioner,* 308 U. S. 355. The decision is also in accord with many cases involving similar facts. See *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6th); *Trafford Oil & Gas Co.* v. *Commissioner,* 78 F. 2d 814 (C. C. A. 3d), certiorari denied, 296 U. S. 630; and *S. A. MacQueen Co.* v. *Commissioner,* 67 F. 2d 857 (C. C. A. 3d). See also *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6th); *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327 (C. C. A. 4th); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C. C. A. 8th), certiorari denied, 291 U. S. 684; and *First Nat. Bank of Greeley, Colo.* v. *United States,* 86 F. 2d 938 (C. C. A. 10th).

Petitioner asserts that the decision here is in conflict with three decisions of the Second and Fifth Circuit Courts of Appeals, but two of these, as pointed out by the court below (R. 268), are clearly distinguishable. In *Chisholm* v. *Commissioner,* 79 F. 2d 14 (C. C. A. 2d), the partnership which took over the corporation's assets had been contemplated long before the sale was negotiated and continued in business after the sale was made by the partnership. Thus it was held there that the partnership was not organized as a temporary device to effect the sale but was a bona fide

firm. *Commissioner* v. ***Falcon Co.,*** 127 F. 2d 277 (C. C. A. 5th), is also distinguishable inasmuch as the Board of Tax Appeals found that the partial liquidating dividends of oil leases were made in that case after the corporation had refused to sell such leases and the sale was made by the shareholders, acting individually, after the distribution in partial liquidation.

The third case relied on by petitioner is *Court Holding Co.* v. *Commissioner,* 143 F. 2d 823 (C. C. A. 5th), now pending in this Court as No. 581 on the Government's petition for certiorari. Since we have asserted in that petition that that case and the instant one are in conflict, we do not oppose the issuance of a writ herein if the writ is to be granted in that case. It is worthy of note, however, that there is an issue in the *Court Holding Co.* case not present here. In the *Court Holding Co.* case, it is contended that the appellate court, despite the rule in the ***Dobson*** case, weighed the evidence and substituted its own views as to the facts for the findings of the Tax Court. Here, the decision of the Tax Court was affirmed by the court below.

CONCLUSION

While we do not oppose the issuance of the writ herein if the case of *Court Holding Co.* v. *Commissioner, supra,* is to be reviewed, we think that since no ***Dobson*** issue is presented, the granting

of the writ is not necessarily required under the circumstances.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ROBERT N. ANDERSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

NOVEMBER, 1944.

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Supreme Court of the United States

October Term, 1944

No. 614

Maurer Steel Barrel Company, Inc.,
Petitioner,
v.
Commissioner of Internal Revenue,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

Your petitioner above named, respectfully shows:

The petition of your petitioner was duly filed herein October 20, 1944 for a writ of certiorari to review a judgment made July 21, 1944 by the United States Circuit Court of Appeals for the Third Circuit affirming a decision of The Tax Court of the United States entered May 12, 1943; said petition was denied by this Honorable Court March 26, 1944 and within twenty-five days thereafter, to wit on April 20, 1945 an order was made herein by the Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States on the appli-

cation of the undersigned counsel for said petitioner, extending to and including May 1, 1945 the time for filing a petition for rehearing in the above entitled cause. This petition is filed within such enlarged time.

Rehearing should be granted for reasons herein stated and writ allowed for reasons set forth in the original petition, overlooked or brought into greater significance and emphasis, since filing of the original petition herein, by the decision of this court in the Court Holding case (#581 this term).

1. The petition for certiorari in Commissioner of Internal Revenue v. Court Holding Company (#581, October Term, 1944) was filed October 11, 1944, nine days prior to the filing of the petition in the cause at bar. Certiorari was granted in that cause November 20, 1944, but determination of the application for certiorari at bar, was apparently held in abeyance pending the briefing and argument of that cause. At the first adjourned session date, March 26th, following the decision of reversal by this court in the Court Holding case March 12th, this Honorable Court denied the certiorari petition at bar. The Solicitor General in his petition in the Court Holding case had claimed (p. 15), a conflict in decisions of various circuits and that (p. 16): "4. Resolution of the conflict is of considerable practical importance. * * * The decision of the court below leaves the Tax Court with a confusing array of conflicting principles by which to guide itself." In the Commissioner's memorandum in response to the petition at bar, it was asserted (p. 13) "Since we have asserted in that petition (Court Holding case) that that case and the instant one are in conflict, we do not oppose the issuance of a writ herein, if the writ is to be granted in that case." The brief of respondent in the Court case made no mention whatever

of the Meurer case and of the substantial and significant elements which removed it from the border line position in which the Court case may be said to have been placed, nor was any mention of the Meurer case made by respondent's counsel in the oral argument before this court, attended by the undersigned counsel.

2. Allowance of a writ and hearing in the Court Holding case touched and settled only a narrow phase of the broad questions common both to the Meurer and Court Holding cases. The opinion of this court, upon the reversal in the Court Holding case, clearly settles the law on the lesser one of two phases common in that and the instant cases, namely that phase pertaining to *negotiating parties whose minds have met prior to a corporate liquidating distribution;* the distribution properly may be disregarded and subordinated to the ensuing sale by the recipient of the liquidating distribution, in the sole undisturbed judgment of the Tax Court. We respectfully submit that had the Meurer case been reviewed and considered in conjunction with the Court Holding case—as, we respectfully urge was the natural hope of the Assistant Attorney General and petitioner's counsel,—there would have been settled the remaining open and conflicting questions of much wider application, broader scope and universal interest than the narrow question involved in the Court Holding case.

3. **Residual question involved below:**

May an inference of corporate intention to sell business assets be predicated solely on the following circumstances and proofs, which is the maximum that can be claimed by the respondent in this case, i.e.:

(a) Grant by individual stockholders of an option to one of their number to purchase their capital shares in that corporation;

(b) Initiation by a corporation of steps leading to a liquidation of its business, distribution of its business assets and retention of its securities;

(c) Concurrent initiation of anticipatory negotiations by those stockholders with the optionee's assignee for sale of the business assets;

(d) *Consummation of the corporate plan of liquidation* and actual distribution of those business assets to the stockholders *before* conclusion of the negotiations by the stockholders and *before meeting of minds on terms of* proposed substitution of the *sale* of business assets for a prescribed exercise of option for shares, and

(e) Sale of those business assets by the stockholders to the optionee's assignee, five days after the stockholders had obtained absolute title under the liquidating distribution plan.

4. The decisions below and denial of a writ have evoked widespread and keen public interest, discussion, comment and concern in the corporate income tax field. Inquiries to undersigned counsel have ranged from Los Angeles to Philadelphia and New York. Meetings of tax experts have been held to discuss the present unsettled state of the law following the reversal of the Court Holding case and the denial of the Meurer certiorari petition. The confusion to which the Solicitor General referred in his petition has not been eliminated by the Court Holding reversal and the denial of certiorari in the Meurer case but has in fact been enhanced or aggravated. This is borne out by an analysis of the

opinion of this court in the Court case, and the application of each significant element therein indicated, to the facts, evidence, or situation of the case at bar.

5. The opinion of Mr. Justice Black in Court Holding case clearly and properly shows that there was conflicting evidence in that case and that the Tax Court findings were supported by the record. The points brought out in that opinion when compared to the case at bar, show a striking dissimilarity, completely ignored in the inadequate presentation, briefing and argument of that case, i.e.:

(a) In that case, "an oral agreement was reached as to the terms and conditions of sale and * * * the parties met to reduce the agreement to writing" before any one even dreamed of a "liquidation". Here, negotiations for sale of corporate assets were initiated on July 9th *subsequent* to the launching of a corporate program for holding a meeting to consider the corporate plan for divestment of corporate business assets and retention of corporate security assets. Here, when the discussions respecting the possibility of a purchase of assets in lieu of exercise of an option on shares were so initiated July 9th, there was already in existence (since June 28) the declared purpose of the negotiating individuals to distribute such assets in liquidation under the plan for complete liquidation then in the process of formulation. Here, moreover, when the negotiations commenced, the prospective purchaser did not know whether either the corporation or the stockholders would ever consent to a sale of business assets. Here, there is no showing that the prospective purchaser was ever ready to purchase the assets upon the terms which ultimately eventuated, until five days after the liquidating distribution was completely effected.

(b) There (in the Court Holding case) the deal was called off by the corporation's attorney who specifically advised the purchaser "that the sale could not be consummated because it would result in the imposition of a large income tax on the corporation". Here, no deal was ever called off by the corporation. True, at bar, an option with respect to *shares* was outstanding prior to the distribution meetings, but there is no showing that the option was ever exercised according to its terms, or that either the optionee, or its assignee, was ready to exercise the option according to its terms prior to the liquidating distribution.

(c) There, the parties during negotiations had definitely in mind only a sale by the corporation—the sale was consummated by the stockholders only after full terms were previously negotiated by and on behalf of the corporation on the one hand and the ultimate purchaser on the other hand. Here, at no time prior to sale of assets by the recipients of the liquidating dividend, was a sale on the corporate behalf broached, discussed or even contemplated.

(d) There, the agreement drawn by the parties subsequent to the liquidating distribution "embodied substantially the same terms and conditions previously agreed upon". Here, no complete, definitive terms were fixed prior to the distribution and suggestions for terms were in a state of flux; two weeks' negotiations were required amongst and between the prospective purchaser's attorneys and the attorney for the partners before an agreement finally eventuated five days after the distribution. At bar the negotiators were dealing not with a simple asset, such as the single piece of property involved in the Court case, but with a complicated, substantial, going business and all its ramifications.

(e) There, when the formal conveyance and distribution was made, nothing remained to be done to effectuate a resale to Miller other than a mere substitution of the individual names for the corporate name in the formal agreement; no further negotiations regarding terms were needed or had. Here, negotiations regarding terms and provisions of a prospective deal were not concluded until five days after the tax consequences of the liquidating distribution had vested, become fixed and irrevocable. Here, there was no evidence that any part of the substantive changes sought by optionee (or assignee) to convert a share-option into a business-assets sales contract had, in fact, been assented to, by the corporation, or the shareholders, prior to the distribution.

(f) There, an actual payment to the corporation prior to the liquidation "was applied in part payment of the purchase price". Here, there was no payment on account to the corporation or partnership until after the liquidating dividend was completely distributed and the terms agreed upon. No payments here were made to the petitioner.

(g) There, the Tax Court had a factual basis for its conclusion that the corporation "had not abandoned the sales negotiations". Here, there isn't a scintilla of evidence to sustain a finding that there were any corporate negotiations whatever prior to the liquidation, nor to sustain the conclusion that *petitioner's* end in view was the sale of the corporate assets at a time when its *shareholders individually* granted an option on their shares. There, the Circuit Court and the Tax Court merely differed in the inferences to be drawn from the record. Here, the Circuit Court improperly deemed the Dobson case as a bar to an adequate consideration of the point raised by the petitioner to the effect that there was no

factual or evidentiary basis for the conclusions upon which the Tax Court decision was predicated.

6. A grievous injustice was inflicted upon the petitioner when its position was frozen for a while and its rights then permanently barred and foreclosed by the consideration of a case, much narrower in scope, where the attorney for the Court Holding Company made no attempt to meet the issues raised in the Commissioner's brief regarding the Meurer and other cases relied on. The respondent's brief in No. 581 cites only the Dobson case and makes no mention whatever of any of the other dozen or so cases cited by the Commissioner both in that case and in the case at bar. No adequate consideration of issues underlying the case at bar could be had without discussion of the two parallel cases upon which we respectfully rely in urging reconsideration of our petition and allowance thereof, namely: Commissioner v. Falcon, 127 F. (2d) 277; Chisholm v. Commissioner, 79 F. (2d) 14. Neither of these cases was cited in the Court Holding Company brief either in the Circuit Court or in the Supreme Court. Both were relied on strongly by us in all courts as requiring a reversal of the decisions below. To the extent that the case below bars expectant stockholders from anticipatory negotiations and dealings on their own account with a prospective purchaser, it is in conflict with a more recent case of the Tax Court: George T. Williams v. Commissioner, 3 T. C. 1002 (pp. 9, 29 of our petition).

7. The established law applicable to the situation disclosed at bar and the equities of this case inherent therein, impelled a conclusion that the corporate distribution below was in good faith planned prior to the initiation of negotiations for the purchase of business assets and effectually

concluded by an actual irrevocable distribution of those assets in liquidation prior to a meeting of minds of the negotiators. The courts below completely lost sight of the fact that all tax consequences of the distribution and liquidation which occurred herein July 17, 1937 were completely crystalized and irrevocable before there was a full meeting of minds between and among negotiating parties. In the case at bar there was no reasonable certainty that after effectuation of the voted distribution in liquidation, the negotiating prospective purchaser would in fact, come to terms and close the purchase of the distributed assets thereafter. In that respect this case differs completely and vitally from the Court Holding Company case (No. 581 October Term, 1944) in which this court properly reversed the Circuit Court and sustained the Tax Court.

8. It is respectfully submitted that by a process of judicial construction and improper subservience of the facts in this case to the rule of the Dobson case (Dobson v. Commissioner, 320 U. S. 489) the courts below have rendered nugatory the express will of Congress as enacted in the Statute (cited in our petition and brief) and the regulations in support thereof, so that, if permitted to remain unreversed, no distribution in liquidation, however well intentioned, may safely be planned by corporate controllers if subsequently the asset distributed should be resold or otherwise summarily disposed of by the distributees.

Prayer

Wherefore your petitioner prays that rehearing of its petition may be granted and thereon a writ of certiorari issue to the United States Circuit Court of Appeals for

the Third Circuit as sought in its petition dated October 18, 1944 filed herein October 20, 1944.

New York, April 28, 1945.

Respectfully submitted,

Emanuel A. Stern,
Counsel for Petitioner,
Meurer Steel Barrel Co., Inc.

Certificate

To the Supreme Court of the United States:

The undersigned, Emanuel A. Stern, counsel for petitioner, Meurer Steel Barrel Co., Inc., hereby certifies that the foregoing petition for a rehearing is presented on behalf of the petitioner in good faith and not for delay.

Dated, April 28, 1945.

Respectfully submitted,

Emanuel A. Stern,
Counsel for Petitioner,
Meurer Steel Barrel Co., Inc.